IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-196

WESLEY BRABANT,
Petitioner,

v.

THE CITY OF SEATTLE, ALLEN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, ROBERT L. GREEN and the UNITED CONSTRUCTION WORKERS ASSOCIATION,
Respondents.

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

BRIEF OF RESPONDENTS CITY OF SEATTLE and CIVIL SERVICE COMMISSIONERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In this case the trial court and the Supreme Court on appeal upheld The City of Seattle's voluntary efforts to comply with Title VII of the Civil Rights Act

of 1964 by the adoption of an affirmative action program, and the selective certification for employment of only minority applicants on certain occasions to implement such affirmative action program.

The trial court's conclusions, set forth in the Summary Judgment of Dismissal, reveal the factual and legal bases for its decision:

> 1. Under Amendment 14 of the United States Constitution and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C.A. secs. 2000(e) et seq.), and Executive Order 11246, as amended, The City of Seattle has a legal duty to take affirmative action to eliminate the effects of past racial discrimination in City employee selection processes and to prevent such racial discrimination from occurring in the future.
>
> * * *
>
> 4. That portion of the affirmative action program of the Engineering Department by which the first of every three vacancies created by retirement or resignation will be filled with a minority application who has passed the required civil service examination does not constitute the adoption of a quota system, but is rather a tool to accomplish the legitimate goals of said program within the timetable established to reach such goals.

(Emphasis supplied)

> 5. Selective certification is lawful in connection with promotional eligible registers because the opportunities for minorities on promotional registers are probably even more limited than on open competitive eligible registers.
>
> 6. The existence of other methods of taking affirmative action to eliminate the effects of past and present discrimination does not preclude the use of selective certification.
>
> 7. The fact that the duty to take affirmative action was recognized voluntarily by The City of Seattle, rather than being imposed by judicial mandate, is immaterial.
>
> 8. The elimination of the effects of past and present discrimination is a legitimate public purpose, and selective certification is a reasonable and effective means of accomplishing such purpose.
>
> 9. The City of Seattle has satisfied the burden of showing the necessity for taking affirmative action to eliminate the effects of past and present discrimination in its employees selection processes; and a showing

> that the City's civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment in accordance with provisions of charter Article XVI, Section 9, as determined by the results of those examinations, and that said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore to have little or no chance of being employed, is sufficient in such connection.

COUNTERSTATEMENT OF THE CASE

The City of Seattle, a city of the first class, is an "employer" under Title VII of the Civil Rights Act of 1964, and subject to the duties of an employer fixed by that act to refrain from engaging in racial discrimination in employment, and to take affirmative action to eliminate the effects of past discrimination. 42 U.S.C.A. § 2000e, et seq.

In addition, Seattle contracts with the United States for millions of dollars of federal financial assistance and as

such is obligated by Executive Order 11246, as amended, to take affirmative action to avoid and eliminate racial discrimination in city employment.

Pursuant to its local procedures, The City of Seattle established an "Affirmative Action Program," the goal of which is to increase the number of underrepresented minority persons employed by the City to correspond with their statistical composition within the available work force in the city.

It was established in the court below by stipulation of facts and by affidavit that Seattle's Civil Service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment, as determined by the results of those examinations; and that such results tended to cause the minority applicants to be placed at the lower end of the eligible registers where they had

little or no chance of being employed. To overcome this discriminatory effect, the Civil Service Commission adopted Rule 7.03(j), which authorizes the submission of the names of minority eligibles to an employing department when deemed necessary by the department head and the Secretary of the Civil Service Commission to implement the affirmative action program. This process is known in Seattle as "Selective Certification," and was used to fill a promotional position with a minority eligible who stood below petitioner on the eligible register and was in fact beyond reach under the usual certification pro= cess. The process and its specific applica= tion were upheld by the Supreme Court of Washington.

GROUNDS FOR OPPOSING WRIT

Respondents oppose the granting of a writ of certiorari to the Washington Supreme Court on the following grounds:

1. That the constitutional question posed by petitioner was not presented to nor decided by the court below.

2. That the issue posed as to Title VII presents no federal question of substance not heretofore determined by this court or in disaccord with other applicable decisions of this court.

ARGUMENT

Much of petitioner's petition is devoted to an effort to escape the effect of a stipulation, attached to its petition as Appendix G and mislabeled "Answer in Intervention," in which he agreed in the trial court that:

> . . . there is no constitutional question of equal protection of

> the law and due process presented, the same having been disposed of in DeFunis v. Odegaard, 82 Wn.2d 11.

Petitioner attempted to revive the federal constitutional issue in his appeal to the Washington Supreme Court, but respondents argued successfully to that court that parties to litigation who stipulate to facts and contentions are bound by their agreements, and that the appellate courts have no authority to disturb the agreement. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 P. 509 (1909); Harstad v. Metcalf, 56 Wn.2d 239, 351 P.2d 1037 (1960). The same rule is binding upon this court. In any event, the constitutional argument cannot be considered by this court since it was not considered either by the trial court or by the Supreme Court of Washington. Street v. New York, 394 U.S. 576, 22 L. Ed. 572, 89 S. Ct. 1354 (1969); Walters

v. St. Lewis, 347 U.S. 231, 98 L. Ed. 660, 74 S. Ct. 505 (1953).

Even if petitioner is entitled to raise the constitutional question of equal protection in this court, no new question of importance is presented because The City of Seattle is proceeding in accordance with the principles announced by this court in previous cases.

In Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971), this court held:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices.

Griggs at 163.

Then, in Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2268 (1975), this Court held that pre-employment tests may be racially discriminatry in effect although not in intent and that such discrimination is prohibited under Title VII of the Civil Rights Act, as amended, and reaffirmed the principle enunciated in Griggs, that Title VII is not concerned with an employer's good intent or absence of discriminatory intent but with the consequences of employment practices. The court then went on to hold that a prima facie case of discrimination was shown by tests which select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. Albemarle at 301. This view was echoed in a later case wherein the court stated that employees proceeding under Title VII need not concern themselves with the employer's

possible discriminatory purpose but may focus solely on the racially differential impact of the challenged practice. Washington v. Davis, ___ U.S. ___, 48 L. Ed. 2d 597, ___ S. Ct. ___ (June, 1976).

In other words, if petitioner were a racial minority for employment alleging employment discrimination and seeking relief from this court under Title VII, he would have been able to establish a prima facie case of employment discrimination on statistics alone. But this petitioner is not of a racial minority. He is white. Yet in this petition he would hold the City to be a different and higher standard. He would require that the City prove specific and intentional discrimination to justify use of the selective certification process. That demand is unjustified and unnecessary under law.

Affirmative action is not limited to remedying "intentional" discrimination. Franks v. Bowman Transp. Co., ___ U.S. ___, 47 L. Ed. 2d 444, 96 S. Ct. ___ (March, 1976); Boston Ch. of NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), NAACP v. Allan, 493 F.2d 614 (5th Cir. 1974). In any event, "intentional" means deliberate and not accidental and may be inferred from operation and effect of employment practices, Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973), and used to correct such practices, United States v. International Brotherhood of Electrical Workers, 428 F.2d 144, 149 (6th Cir. 1970), cert. den., 400 U.S. 943, 27 L. Ed. 2d 248, 91 S. Ct. 245; United States v. Wood Wire & Metal Lath Union, 471 F.2d 408, 413 (2d Cir. 1973), cert. den., 412 U.S. 939, 37 L. Ed. 2d 398, 93 S. Ct. 2773 (1973).

The necessity of remedial and compensatory action and the lawfulness of

such action where the effects of unlawful employment practices continue to exist can no longer be seriously questioned. Franks v. Bowman Transp. Co., supra; Albemarle Paper Co., supra; Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L. Ed. 2d 514, ___ S. Ct. ___ (March, 1975); Griggs, supra. The fact that such remedial effort is voluntary instead of court-ordered should make no difference. As this court has already indicated, cooperation and voluntary compliance with the Civil Rights Act's mandate are preferred means of achieving its goals. Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 156, 94 S. Ct. 1011 (1974).

Of necessity, affirmative action programs consider race in the development of goals, timetables and strategies to overcome the effects of past discrimination. Color-consciousness is approved under such circumstances, Boston Ch. of NAACP, Inc. v. Beecher,

504 F.2d 1017 (1st Cir. 1974); Rios v. Enterprises Assn. of Steamfitters, 501 F.2d 622 (2d Cir. 1974), and does not violate Title VII. Contractors Assn. of Eastern Pa. v. Sec. of Labor, 442 F.2d 159, 173 (3d Cir. 1971), cert. den., 404 U.S. 854, 30 L. Ed. 2d 95, 92 S. Ct. 98. In addition to paragraph 8 of the stipulation of facts, a compelling showing of the discriminatory effects of Seattle's past practices was made in the affidavit of Philip Y. Hayasaka, attached hereto as Appendix A.

A central purpose of Title VII is to make whole the victims of discrimination, and so long as the number of employment opportunities is finite, the expectations of other arguably innocent employees will be diminished in the process. Franks v. Bowman Transp. Co., ___ U.S. ___, 47 L. Ed. 2d 444, 96 S. Ct. ___ (1976). The City of Seattle, using tests which have not been validated

under the regulations of the Equal Employment Opportunities Commission and recognizing their discriminatory effect, voluntarily adopted a reasonable and effective program to achieve the goals of Title VII without requiring the employment of unqualified persons, without imposing an absolute preference for minorities, and without displacing any person presently holding a position. All of this is potentially within the sweep of a federal court injunction to enforce Title VII rights against Seattle under existing law.

The petition to review Seattle's actions here should be denied.

Respectfully Submitted,

JOHN P. HARRIS
Corporation Counsel

GORDON F. CRANDALL
Chief Assistant

Attorneys for Respondents
City of Seattle and its
Civil Service Commissioners

APPENDIX A

[COPY RECEIVED
JUN 29 1973
Siderius, Lonergan & Crowley]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON, and DAVID L. DAY, Plaintiffs,	)	
WESLEY BRABANT, Plaintiff in Intervention,	)	NO. 757 364
vs.	)	AFFIDAVIT OF PHILIP Y. HAYASAKA
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants.	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF K I N G)

PHILIP Y. HAYASAKA, being first duly sworn, on oath deposes and says:

That he is the Director of the Department of Human Rights of The City of Seattle, and makes this affidavit from his own personal knowledge and information and is competent to testify hereto.

That the Department of Human Rights was established by Ordinance 97971, approved July 30, 1969

"to investigate, study and act to identify and relieve problems of human rights relating to race, religion, creed, color, or national origin; to design and carry out programs to promote equality, justice and understanding among all citizens of the City; to recommend policies to all departments and divisions of City government in matters affecting such human rights; and to recommend legislation for the implementation of such programs and policies."

That in 1969, the City had 10,294 employees, 780 or 7.6% of whom were members of minority races. The 1970 census indicates that of the 530,831 persons living in Seattle, 77,796 or 14.7% are minorities. On a bare statistical basis, therefore, minorities were then underrepresented on the work force of The City of Seattle.

Attached hereto as Exhibit "A" is a copy of Puget Sound Prospectus - Affirmative Action, published by the Seattle Chamber of Commerce which analyzes local population, labor force and and minority percentages in the labor force, based upon the U. S. Census and Washington State Employment Security Department and Washington State Office of Program Planning and Fiscal Management reports.

The Seattle Engineering Department on June 21, 1972 adopted an Equal Opportunity Policy, the aim of which is to insure full opportunity for minorities in all classifications of Engineering Department employment. To implement the policy, the Engineering Department resolved to fill the first of every three vacancies created by retirement or resignation with a minority applicant, even if such applicant were not in the top five (or 25%) on the list of eligibles. A copy of a synopsis of the policy statement is attached as Exhibit "B", and a copy of the

Engineering Department's Affirmative Action Program is attached as Exhibit "C".

On August 25, 1972, Mayor Wes Uhlman issued the "Mayor"s Executive Order Establishing an Affirmative Action Program for City Employment, a copy of which is attached as Exhibit "D". In addition, Mayor Uhlman recently transmitted a comprehensive affirmative action program for city employment to the City Council for its consideration and adoption as official City policy. A copy of said program will be supplied by later affidavit.

Statistics pertaining to The City of Seattle and its Engineering Department work force are collected and developed by the personnel division of the Executive Department and the Department of Human Rights on a quarterly basis. The following statistics regarding the Engineering Department are from the December 31, 1972 quarterly report and were considered by the Department of Human Rights prior to the latter department's approval of the use of selective certification for filling the position of Signal Electrician Foreman in question in this case:

1. Of the 3 Signal Electrician Foremen in the Engineering Department, 0 were minorities.

2. Of the 50 Foremen in the Engineering Department, 3 or 6% were minorities.

3. Of the 141 individuals in the "Craftsman" category at the Engineering Department, 12 or 8.5% were minorities.

4. Of the 136 "unskilled laborers" in the Engineering Department, 50 or 36.7% were minorities.

5. Of the 1,178 employes in the Engineering Department, 199 or 16.9% were minorities.

6. Of the 10,630 persons employed by The City of Seattle, 1,359 or 12.7% were minorities.

In 1969, The City of Seattle employed 10,294 persons, 708 of whom or 7.6% were minorities. In 1971, The City of Seattle employed 10,921 persons of which 1,198 or 11.0% were minorities. The most current quarterly report, dated April 17, 1973, indicates that The City of Seattle employs 10,723 persons of which 1,450 or 13.6% are minorities.

The City of Seattle is the recipient of millions of dollars in Federal grants each year, which grants require the City to have and enforce effective affirmative action programs for City employment.

Attached hereto as Exhibit "E" is a copy of a memorandum from Assistant Attorney General Morton M. Tytler dated October 25, 1972, reviewing The City of Seattle's affirmative action program as it existed on September 20, 1972. Mr. Tytler is the legal adviser to the Washington State Human Rights Commission,

/s/ PHILIP Y. HAYASAKA
PHYLIP Y. HAYASAKA

SUBSCRIBED AND SWORN to before me this 28 day of June 1973.

/s/ RON CHATBURN
Notary Public in and for the State of Washington, residing at Seattle

[EXHIBITS NOT ATTACHED]